TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. 4[illegible]

THE FIRST NATIONAL BANK OF OMAHA, PLAINTIFF IN ERROR,

vs.

JOHN I. REDICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED OCTOBER 4, 1892.

SUPREME COURT OF THE UNITED STATES.

No. 610.

THE FIRST NATIONAL BANK OF OMAHA, PLAINTIFF IN ERROR,

vs.

JOHN I. REDICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 Pleas had in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, at its court-room in Lincoln, Nebraska, at the January adjourned term, 1881.

Present, honorable Elmer S. Dundy, judge of the district court of the United States for said district of Nebraska, sitting in said circuit court for said district.

Be it remembered, that heretofore, to wit, on the 6th day of March, 1880, John I. Redick filed his petition in said circuit court against the First National Bank of Omaha, which said petition is in words and figures following, to wit:

2 *Petition.*

In the circuit court of the United States for the district of Nebraska.

JOHN I. REDICK, PLAINTIFF,
vs.
THE FIRST NATIONAL BANK OF OMAHA, DEFENDANT.

Said plaintiff for his cause of action against said defendant states:

That said defendant, the First National Bank of Omaha, is, and for more than fifteen years last past has been, a corporation, and was duly organized and incorporated under and in pursuance of an act of Congress of the United States entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25th, 1863, and the several acts amendatory thereof and supplemental thereto. Said bank about the date of its organization was duly authorized to commence business by the certificate of the Comptroller of the Currency, and is, and ever since its incorporation has been, located, established, and carrying on the business of banking at Omaha, within the State and district of Nebraska.

On the 12th day of January, 1875, one Detliff Sievers made his four promissory notes in writing, all of the date last aforesaid, and delivered the same to one Elisha O. Crosby, and thereby for value received promised to pay to said Elisha O. Crosby or order, the following sums of money, to wit: $2,800.00 in two years after date; $2,600.00 in three years after date; $2,400.00 in four years after date; $2,200.00 in five years after date; all said notes bearing interest after maturity at the rate of
3 12 per cent. per annum. At the same time, in order to secure the payment of said notes which were given for part of the purchase money therefor, said Detliff Sievers executed and delivered to said Elisha O. Crosby a mortgage on a farm of 800 acres of land in Dodge County, said State, which was duly recorded.

Thereupon said Elisha O. Crosby indorsed and delivered said notes and transferred said mortgage to the plaintiff, who became the owner thereof.

On the 16th day of December, 1875, the plaintiff, who for a long time had been a customer at the defendant's bank, applied to the defendant for a loan of money for the express purpose of discharging an obligation,

which the defendant then held against him for about $12,000.00, and the defendant then offered to lend the plaintiff $6,993.34 on the following terms and conditions, which were agreed to and accepted by the plaintiff, to wit: that the plaintiff would transfer and deliver to the defendant said four promissory notes and said mortgage, and that the plaintiff should make himself liable for the payment of said notes by his indorsement thereof; that upon receiving said notes so indorsed by the plaintiff, and the said mortgage security, said defendant would lend to the plaintiff said sum of $6,993.34, said amount being understood and agreed between the parties to be the face of said notes, less a discount at the rate of 12 per cent. per annum for the full time the several notes had to run from the 16th day of December, 1875, up to maturity.

That is to say, upon the note of $2,800.00 the defendant allowing $2,428.54 and exacting and receiving $371.46 in advance as a 12 per cent. discount for 1 year 1 month and 5 days, being interest at the rate of about 14 per cent. per annum; and upon the note of $2,600.00 the defendant allowing $1,943.07 and exacting and reserving $656.93 in
4 advance as a 12 per cent. discount for 2 years, 1 month, and 5 days, being interest at the rate of over 16 per cent. per annum; and upon the note of $2,400.00 the defendant allowing $1,505.60 and exacting and reserving $894.40 in advance as a 12 per cent. discount for 3 years 1 month and 5 days, being interest at the rate of more than 19 per cent. per annum; and upon the note of $2,200.00 the defendant allowing $1,116.13 and exacting and reserving $1,083.87 in advance as a 12 per cent. discount for 4 years 1 month and 5 days, being interest at the rate of more than 23 per cent. per annum, making, aside from interest on said notes after maturity at the rate of 12 per cent. per annum, the amount of $3,006.66 so exacted and reserved in advance as discounts upon said loan of $6,993.34.

In pursuance of said corrupt and unlawful agreement on said 16th day of December, 1875, the defendant loaned the plaintiff said sum of $6,993.34, said defendant exacting, receiving, and reserving for the use of the same, besides interest at the rate of 12 per cent. per annum after the maturity of said notes, the aforesaid discounts of $371.46, $656.93, $894.40, and $1,083.87, amounting to $3,006.66, and the plaintiff transferred and delivered to the defendant said four promissory notes and said mortgage and the said plaintiff made himself liable for the payment of said notes by his indorsement thereof.

Said loan was so made to the plaintiff by the defendant on the aforesaid corrupt, unlawful, and usurious agreement, and to enable the defendant to exact, receive, and charge upon said loan interest at a greater rate than 12 per cent. per annum, the highest rate of interest allowed by the laws of the State of Nebraska when said loan was made.

That the said defendant knowingly, unlawfully, and corruptly
5 took, received, reserved, and charged upon said loan a rate of interest greater than was allowed by the laws of the State of Nebraska, and greater than allowed by section 5197 of the Revised Statutes of the United States, and contrary to the provisions of section 5198 of said Revised Statutes.

At maturity the defendant made due demand of payment of said notes, and caused the same to be duly protested for non-payment, of all which the plaintiff had due and legal notice, and was charged as indorser.

The plaintiff has paid said defendant on account of said loan of $6,993.34 for principal and interest charged and exacted on the same the full amount of $11,748.28, being the face of said notes with interest thereon at the rate of 12 per cent. per annum from maturity in different payments made as follows: On the 30th day of September, 1878, he paid the defendant $2,840.75; on the 24th day of November, 1879, he paid the defendant $589.50; on the 29th day of November, 1879, he paid the defendant $193.34; on the 5th day of March, 1880, he paid the defendant $8,124.69. That said usurious transaction occurred within two years prior to the commencement of this action.

That upon said loan of $6,993.34 the said defendant knowingly and corruptly constructed for, took, received, reserved, and charged to and from said plaintiff for interest at a rate greater than allowed by the laws of the State of Nebraska, and greater than allowed by section 5197 of the Revised Statutes of the United States the sum of $4,754.94 contrary to and in violation of the provisions of section 5198 of said Revised Statutes, and that said plaintiff, before the commencement of this action, paid said illegal interest to said defendant, and under said section 5198 is en-
6 titled to recover back from said defendant twice the amount of interest so unlawfully received by the defendant.

Wherefore plaintiff prays judgment against said defendant for the sum of $9,509.88, with interest thereon from the commencement of this action, besides costs.

REDICK & REDICK, &
ALBERT SWARTZLANDER,
Plaintiff's Attorney.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

John I. Redick, being first duly sworn, deposes and says he is the plaintiff named in the foregoing pleading, and that he believes the facts stated in said pleading to be true.

JOHN I. REDICK.

Subscribed in my presence and sworn to before me at Omaha, Nebraska, this 6th day of March, 1880.

[SEAL.] DEXTER L. THOMAS,
Notary Public.

Said bill is endorsed as follows: No. 312 E., U. S. circuit court, district of Nebraska. John I. Redick vs. The First National Bank of Omaha. Petition. Filed March 6, 1880. Watson B. Smith, clerk. Redick & Redick, & Albert Swartzlander, plaintiff's attorneys.

Thereupon, afterwards, to wit, on the 6th day of March, 1880, a summons was duly issued in said case, and on the 8th day of March, 1880, returned and filed; which said summons is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Nebraska, ss:

7 The President of the United States of America to the marshal of the district of Nebraska, greeting:

You are hereby commanded to notify the defendant The First National

Bank of Omaha that it has been sued by John I. Redick in the circuit court of the United States for the district of Nebraska aforesaid, at Omaha, Nebraska that unless it answer by the 5th day of April, A. D. 1880, the petition of the said plaintiff this day filed against it in the clerk's office of said court, said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of March, A. D. 1880.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 6th day of March, A. D. 1880, and in the 104th year of the Independence of the United States of America.

Attest:

[SEAL.]

WATSON B. SMITH, *Clerk.*

Attached to said summons is the return of the marshal, in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 6th day of March, 1880, I received this summons, and on the 6th day of March, 1880, I served the same upon the within named The First National Bank of Omaha, by Herman Kountze, its president, in Douglas County, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

WILLIAM DAILY,
United States Marshal for the District of Nebraska,
By E. L. BIERBOWER,
Deputy United States Marshal.

Marshal's costs, $2.06.

8

Said summons is endorsed as follows: No. 312, Doc. E., United States circuit court, district of Nebraska. John I. Redick vs. The First Nat'l Bk. of Omaha. Summons. Amount claimed of the defendant by the plaintiff is $9,509 $\frac{88}{100}$, with int. thereon from the commencement of this action and costs of suit. Returned and filed this 8th day of March, 1880, Watson B. Smith, clerk. Redick & Redick & Swartzlander, atty's for pl'ff.

Thereupon afterwards, to wit, on the 7th day of June, 1880, an answer was filed in said case, which said answer is in words and figures following, to wit:

Answer.

In the United States circuit court, district of Nebraska.

JOHN I. REDICK
vs.
THE FIRST NATIONAL BANK OF OMAHA.

Now comes the defendant by J. M. Woolworth, its attorney, and for answer says:

On the 7th of December, 1875, this defendant held three notes, one for $2,240 on which said plaintiff was endorser, and which had lately become due; the second for $5,000, and the third for $6,082.32, of which said plaintiff was maker, and which were to mature in March following; the two last mentioned were secured by bonds of the Omaha and Northwestern Railroad to the amount of $30,000. On said day said plaintiff offered said defendant a large number of notes made by different parties for sale, and among them those mentioned in said petition, which, with others, the defendant consented to purchase at their face less a discount of
9 12 per cent. per annum, which it accordingly did, and the proceeds thereof amounted to $10,513.31. Upon the notes theretofore held by the defendant a rebate of interest was allowed to plaintiff of $376.71, so that after applying the said sum of $10,513.31 upon the said notes first above-mentioned there remained due $2,437.06 coming to said defendant, for which with discount said plaintiff gave to it his note at 4 months, and the said defendant surrendered the three notes theretofore held by it together with the bonds pledged to secure the same.

And this defendant denies that at that time or at any other time the plaintiff applied to it for a loan of money, for the purpose of paying his debt to it, or that the defendant offered to loan him $6,993.34 or any other sum upon the terms and conditions in the said petition alleged, nor was the said transaction in reference to the notes in the said petition mentioned, or in respect of the said sum of $6,993.34, being the proceeds of said notes, a loan of money or so intended or understood by the parties, nor was the same in fact, nor was it intended or understood by the parties to be, a corrupt, unlawful, or usurious agreement, or made, or contrived, or designed to enable the defendant to exact, receive, or charge interest at a greater rate than 12 per cent. per annum, nor did the defendant knowingly, unlawfully, or corruptly contract for, take, reserve, receive, or charge to or from the plaintiff upon the said transaction a rate of interest greater than was allowed by the laws of the State of Nebraska or of the United States, or contrary thereto.

The said transaction, which is the same as that alleged by the plaintiff in his petition, was not and was not understood or intended by the parties to be a loan of any sum of money whatever by the defendant to said plaintiff, but was and was intended and understood by the parties
10 to be a sale of said notes at the usual rates of discount allowed by the laws of Nebraska.

On the 6th of March, 1880, it was discovered by the defendant that the sum paid by the plaintiff on the previous day exceeded what was due to it on the notes mentioned in said petition by the sum of $612.65, which sum the defendant then and there refunded to the plaintiff.

On the 12th of April, 1877, this defendant exhibited its bill in equity in this court against said Sievers, Crosby, and Redick for the foreclosure of the mortgage in the said petition referred to, and such proceedings were had thereon that at the November term, 1877, a decree was rendered for the foreclosure of said mortgage and sale of said premises, which decree, on the 5th of March, 1880, defendant assigned to said Redick.

On the 12th of April, 1877, this defendant commenced its action against said Sievers, Crosby, and Redick on the note firstly in said petition mentioned, and such proceedings were had thereon that at the November term,

1877, it recovered a judgment against said Sievers, Crosby, and Redick for $3,116.40, its damages, and $105.90, its costs, which judgment was never reversed, modified, or vacated, but which was paid by said plaintiff in and by the several sums by him in his said petition alleged to have been paid, and by said judgment he is concluded in respect of the matters in his petition alleged touching the said note.

J. M. WOOLWORTH,
Def't's Att'y.

STATE OF NEBRASKA,
Douglas County, ss:

Henry W. Yates, being duly sworn, says he is cashier of the defendant in the above answer, and he believes the facts stated therein are true.

HENRY W. YATES.

11 Subscribed in my presence and sworn to before me this 7th day of June, 1880.

[SEAL.] LEWIS S. REED,
Notary Public.

Said answer is endorsed as follows: No. 312 E. In the United States circuit court, district of Nebraska. John I. Redick vs. The First National Bank of Omaha. Answer. Filed June 7, 1880. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 15th day of June, 1880, a reply was filed in said case, which said answer is in words and figures following, to wit:

Replication.

In the circuit court of the United States, district of Nebraska.

JOHN I. REDICK, PL'FF,
vs.
FIRST NATIONAL BANK OF OMAHA, DEF'D'T.

For reply to answer the plaintiff denies each and every allegation in said answer contained, except what is herein expressly admitted to be true.

Admits defendant held the three notes of plaintiff as therein stated; admits it held $30,000 of bonds as collateral security; denies it delivered up said bonds as in said answer stated, but only on condition other securities were given in there stead, which was done.

Admits the rebate of interest, $376.71, and the giving of his note for four months for $2,437.06; admits that he paid back to this plaintiff six hundred and twelve dollars and sixty-five cents, which amount had been paid by plaintiff to defendant before that time for which defend-

12 ant had given him no credit; admits the mortgage was foreclosed and a judgments taken, as in said answer stated, but alleges that said foreclosure proceedings and the judgment were part of the same trans-

action, and plaintiff alleges that all of said proceedings were had at the expense of this plaintiff according to the original usurious agreement.

And this plaintiff most distinctly denies that at the time stated in said answer he offered for sale to defendant a large number of notes, and among others those described in the answer, and that it purchased them or either of them, but alleges that said notes and collaterals to the amount of about $28,000 were left with said defendant for security for the payment of said discounted notes for a loan of money as set forth in said petition, and for no other purpose. And this plaintiff prays as he has already prayed in his petition.

REDICK & REDICK,
ALBERT SWARTZLANDER,
Atty's for Pl'ff.

UNITED STATES OF AMERICA,
State and District of Nebraska, ss:

John I. Redick, being first duly sworn, deposes and says: I am the plaintiff in the above-entitled action; I know the contents of the foregoing reply, and the facts therein stated are true as I verily believe.

JOHN I. REDICK.

Subscribed in my presence and sworn to before me this 15th day of June, A. D. 1880.

WATSON B. SMITH, *Clerk.*

13 Said reply is endorsed as follows: No. 312 E. Circuit court United States, dist. of Nebr. Jno. I. Redick, pl'ff, vs. First National Bank of Omaha, def 'd't. Reply. Filed June 15, 1880. Watson B. Smith, clerk. Redick & Redick, A. Swartzlander, atty's for pl'ff.

Thereupon, afterwards, to wit, on the 26th day of March, 1881, a notice was filed in said case, which said notice is in words and figures following, to wit:

In the United States circuit court for the district of Nebraska.

JOHN I. REDICK
vs.
THE FIRST NATIONAL BANK OF OMAHA.

TO REDICK, REDICK & SWARTZLANDER,
Attorneys for Plaintiff.

GENTLEMEN: Take notice that on the 30th of March, instant, at the court-room in Lincoln, at the opening of court on that day, or as soon thereafter as counsel can be heard, or, if court be not then sitting, at the chambers of his honor Judge Dundy, I shall apply to him to settle the bill of exceptions in this cause.

J. M. WOOLWORTH,
Attorney for Defendant.

DISTRICT OF NEBRASKA, *ss:*

I, W. E. Rogers, being duly sworn, say that I served the above notice

upon A. Swartzlander, attorney for said plaintiff, on the 25th day of March, 1881, by leaving with him a copy thereof at his official rooms in the city of Omaha.

W. E. ROGERS.

Subscribed in my presence and sworn to before me this 26th day of March, 1881.

[SEAL.] W. H. HUGHES,
Notary Public.

14 Said notice is endorsed as follows: No. 312 E. United States circuit court, district of Nebraska. John I. Redick vs. The First National Bank of Omaha. Notice. Filed March 26th, 1881. Watson B. Smith, clerk. James M. Woolworth, attorney for def't.

Thereupon, afterwards, to wit, on the 5th day of September, 1881, a bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

Bill of exceptions.

In the United States circuit court, district of Nebraska.

JOHN I. REDICK
vs.
THE FIRST NATIONAL BANK OF OMAHA.

Be it remembered that on the trial of this cause before the honorable E. S. Dundy, judge, and a jury, at the term of November, 1880, John I. Redick testified that the papers, copies of which are hereto annexed at the end of Redick's testimony, were received by him from defendant; that he owed the bank $12,000 or $13,000, but reduced it to two notes, one for $6,000, and one for $5,000; the bank also held a note made by Griffin, endorsed by him for $2,200. The bank held Omaha and Northwestern Railroad shares as security for all he owed it, though there was no bargain. In 1875 I bargained these bonds to one Gise for land. I gave Gise an order for the bonds, and told Herman Kountze I would give him a mortgage on this or other property in place of the bonds. He assented. Gise was to clear off a large mortgage; he did not do so, and did not get the bonds. The bank sent them to New York. At my request Kountze had them returned, and they came back and were held as collateral for whatever I owed the bank. Kountze came to my office to fix our matters. I said, "Mr. Kountze, I would like
15 to sell you right out some paper and notes and take up my paper." He said the bank never bought paper, but would discount it with my endorsement, and make myself liable. I mentioned the Seivers notes, $10,000, at 1, 2, 3, & 4 years, and asked, "How do you like that?" He answered, "Seivers is a good man, and the bank will discount them for you if you will endorse them." He took them and others to his bank. Three or four days afterwards I called, and he said, "I will take this Sievers note and that note, and so on, and discount them for you and loan you sufficient money to take up your original debt." I said, "That will

be all right." My paper would soon be due, and I was anxious to have it extended. He discounted the notes and placed the amount to my credit. I checked for it so as to take up my whole indebtedness. The Sievers notes were one for $2,200, one for $2,400, one for $2,600, one for $2,800. This last statement is in Mr. Kountze' handwriting. It was made at the time; it shows how the debt was paid. I claim he executed a loan upon these bonds. This other relates to the King security. When I sold the King land he refused to cancel the mortgage until I paid $4,000. These took the place of the Seivers notes.

(Defendant objected to last page of statement as immaterial.) It was not made at the same time as the others, and had nothing to do with the transaction. The objection was overruled and plaintiff excepted, and paper admitted in evidence.)

About a year afterwards I turned out to Mr. Kountze $9,000 of King notes as collateral security in addition to what he held. He had the bonds worth $8,000 or $9,000, the King notes, $9,000, and the Sievers notes, secured on 800 acres of land to secure my two notes of $5,000 and
16 $6,000, and Griffin's note of $2,200. I had sold the land and asked Kountze to release the mortgage, and promised to get the money and bring it back to him. He refused, unless I deposited $4,000. I paid it all up by notes and paper, which came to $8,124.69, which paid the balance. I endorsed all the notes. I did not know how much the discount figured when Kountze took them to his office. I found they gave me only $6,900, when they amounted to $10,000. I told him it was a terrible discount. He laughed—that was the way it figured. I had done a great deal of business with him, and paid them a large amount of interest. The payment of September 30, 1876, of $2,840.75, was the first trouble we ever had. They had my bonds after they came from New York.

(The defendant objected to testimony upon this matter as immaterial. The objection was overruled, and defendant excepted.)

The witness proceeded: I sold the bonds to Mr. Yates for $8,000, which was placed to my credit. They threw out one of my check' on the amount, and told me they would apply $2,810 on Sievers' debt. I objected, but found they had a right to do so, and made no fuss about it. They credited it. The mortgage was foreclosed by Connell for me. At the sale Mr. Kountze bid in one quarter section for $600 and odd. He was to credit me this. When I came to pay up the whole debt, I paid it all and forgot the $600. I called his attention to it. He found the mistake and repaid me the $600. I paid the costs of the suits, and did not charge the bank a dollar for services. I submitted to the discount to keep my credit good with the bank.

Cross-examined:

The $6,000 and $5,000 were the result of a bigger note given
17 long before, to which the railroad bonds were held as collateral and were continued to be so held. I gave Gise the order for the bonds before I saw Kountze about it. He said we could fix it by my giving mortgage in place of the bonds. A few days afterwards he came to my office, and I gave him the notes in my back room to take to the bank to see what he would take. I went to the bank to finish the transaction. He showed me the statement of what it came to. I

don't think Kountze consulted Yates. My memorandum shows the transaction was the 16th of December. It was done under the statement, but I won't say that it was passed to my credit that day. My notes of $6,000 and $5,000 were to be taken up and the paper applied to their payment as far as it would go. I gave my note for the balance, $2,300 or $2,400. Nothing was said about the rate of discount from the notes I gave him. He selected some, and which he would take, and rejected others. The $6,000 and $5,000 were not due. They rebated interest on them some. After the Seivers notes were not paid, it was understood between me and the bank that I was to foreclose the mortgage personally, or through somebody else. I requested it. Connell was in my office, and the bank, at my request, gave the mortgage to him to foreclose. The bank bought 160 acres for between $600 and $900, and I asked Kountze to give me the benefit of the purchase. There was 160 on the bluffs and 640 on the bottom. I asked him to bid more, but he would not. I said, "You buy and give me the right to sell." I understood he would, but he did not say so. I could sell it for $1,000, but he would not do it. He was to give me credit for $600 and keep the land. I think he gave me credit for $900. He was under no legal obligations to give it to me. I wanted $1,000. There were taxes on it. I turned over the King notes in 1876, a year after this transaction. I turned them over as further security for the Sievers notes and anything I might owe. Kountze did not
18 discount them to me; he held them like a horse or anything else as collateral. Kountze would not discount them, because he did not think King reliable. I endorsed them as collateral. I went to them to get them to let me sue them. They consented if I would keep them out of expense. I gave a bond to hold them harmless. I did not in the suit on Seivers' note. The Northwestern bonds were held as collateral in the Seivers notes. When they sold the bonds I thought their lien was gone, and they had no right to retain any of the proceeds to apply on the debt. Their was no time fixed for the payment of the $6,900 borrowed, except by the collateral security. They took no other evidence from me except my endorsement on the back of the notes. The Seivers notes were discounted by the bank and substituted in place of my two notes, and took the place of the original debt. I got all the land except the quarter Kountze bought. I paid the whole matter up March 5, 1880. The bill of foreclosure in suit of First National Bank vs. Seivers and others was dismissed as to me by the court, and no personal decree was made as to me in foreclosure suit.

The plaintiff read in evidence a paper referred to by said Redick, and in handwriting of said Kountze, of which the following is a copy:

A.

Note of P. J. Karbach	$360	
Less cred	10	
	350	
Dis. 1 y'r, 4 mo's, 8 d'ys	56 94	
		$293 06
Note Watson B. Smith	$1,300	
Int. 6 mo's & 7 d'ys	68 03	
		1,368 03

Note M. Spitly	1,000		
Int. 1 y'r	80		
	$1,080		
19 Dis. 10 mo's & 24 d's	116 64		
			963 36
Note M. Spitly	1,000		
Int. 2 y's	160		
	1,160		
Dis. 1 y'r, 10 mo's, & 24 d's	264 48		
			895 52
Note Sievers	2,800		
Dis. 1 y'r, 1 mo., & 5 d's	371 46		
			2,428 54
Note Sievers	2,600		
Dis. 2 y'rs, 1 mo., & 5 d's	656 93		
			1,943 07
Note Sievers	2,400		
Dis. 3 y'rs, 1 mo., & 5 d's	894 40		
			1,505 60
			$9,397 18
A, B, F			$9,397 18
Sievers' note	2,200		
Dis. 4 y's, 1 mo., 5 d's	1,083 87		
			1,116 13
Note J. I. Redick, 4 mo's., 3 d's	2,660 19		
Dis	109 06		
			2,551 13
			$13,064 34
To note & int. J. T. Griffin...	2,240		
Int. 7 da's	4 66		
		2,244 66	
20 Note J. I. Redick	6,082 32		
Do	5,000		
	11,082 32		
Dis. refunded	376 71		
		$10,705 61	
			12,950 27
Bal. to cred. of note			114 07

Thereupon pl'ff rested.

HERMAN KOUNTZE testified for the defendant.

I am president of the defendant, and the person referred to by Mr. Redick.

If I will be allowed I will make an explanation in regard to that matter that will give the jury a better idea as to how that debt first originated.

Mr. Redick, among others, and we, with others, undertook to build the Omaha and Northwestern Railroad, and along in the early part of 1871, 1872, and 1873 railroad building became quite a burden. It became impossible to place securities, and the company, like most other companies, became indebted for construction, and it was found that the bonds of the company could not be sold to outside parties. The result was that the company was indebted, and it was desired that these debts be paid, and it was resolved that the stockholders of the company take the bonds that were on hand unsold and undisposed of, at the rate of fifty cents on the dollar, and pay the money into the company. The stockholders agreed to do so, but Mr. Redick found that he diden't have ready money to pay for his part of the bonds, or all of them, and he asked the bank for a loan, and the bank agreed to carry a loan on these bonds. I do not remember the amount of the loan; it was probably about $12,000; it may have been $14,000; this was probably in 1873, and then this loan was carried along and renewed on these bonds several times, and resulted in these various renewals, and was finally landed in these two notes—one for five thousand and the other for six thousand dollars.

21 The bank held the railroad bonds as collateral to Redick's two notes, one of five and one of six thousand dollars, and for other debt. He endeavored to trade the bonds to Gise and Paddock for property, 11th and Douglas street, but the trade fell through because there was a mortgage on, I think, Paddock's part, held by a New York party. They were sent there in order to let the New York party determine whether he would take them in lieu of his mortgage at Gise or Redick's request. They were then returned to the bank. I do not remember the conversation at his office. He brought the securities to me at my desk in the bank, and said he wanted to take up his paper with them. I replied it was longer than the bank was accustomed to take, and I must consult others. I advised with Mr. Yates, the cashier, and selected some which we were willing to take and refused others. I told him we would take the paper we had selected. I think he asked me to take it without his endorsement, but I declined. I did not tell him that the bank never bought paper; that would have not been true. We buy paper almost every day. I made up the statement after Redick left, and sent it to him. There were other notes besides the Seivers notes: Spitley's two notes, one for $1,160, the other for $1,080; Smith's, $1,368.03; Karbach's, $350; total amount of paper discounted for Redick that day, $13,958.03; amount of discount, $3,444.72—the rate was 12 per cent. per annum, and no greater. The amount was applied on Griffins' note, endorsed by him for $2,240, his own note for $5,000 coming due March 19, 1875, on which was a rebate of $170; also his note for $6,082.32, due March 19, 1876, on which was rebate of $276.71. Redick took up his own note and Griffins', amounting to $13,958.03. I paid him him $10,513.31, leaving balance against him of $2,436.96. For this he gave his individual note at four months

22 for $2,546.12, which, less $109.06, the discount, balanced the transaction. There was no credit to him on the books, nor any check made for it. I simply bought the paper and delivered him the old paper. This released the railroad bonds. Subsequently he disposed of one, two, or three of them, and gave orders for them, and two or three years afterwards sold the balance to Mr. Yates, and the proceeds were passed to his

credit. At that time the first Seivers note was past due and in judgment, and the bank took the liberty of charging off those past due notes against Redick. The Seivers notes drew interest from maturity, as also the others taken by the bank, except Smith's.

The mistake about the $660 was made by the collecting clerk upon stating the account. The next day Redick showed me the error and I immediately corrected it. He and I attended the sale when I bought the quarter section for $662. As we were coming from it, he said we ought not to try to get any advantage of him in this matter, as he had the debt to pay, and said he should be allowed to sell the land so as to cover it. I said I would be very glad if he could do that, and the bank sought no advantage of him. A week or month afterwards he said to me he could sell that piece of land for $1,000. I answered it ought not to be sold for $1,000; that it was the better piece, and should go with the rest of the land. He preferred to sell it, but I declined; afterwards I agreed to give the debt the benefit of $1,000, less cost of redeeming from tax titles. He said no, he would take $850 and I should take care of the tax titles. I agreed to it, and made the credits accordingly. He insisted upon my paying $61.72 costs of foreclosure, which I consented to do, although it was not in the bargain. I have been engaged here in banking since 1857.

Question. Is it the custom of banks or bankers to make loans with collateral security therefor when the borrower does not give this note or evidence of debt for the sum borrowed?

23 (Objected to by pl'ff as immaterial. The objection was sustained by the court, which refused to admit the answer, and thereupon the defendant excepted to the rule of court.)

Cross-examined:

The railroad bonds were sent to my broker in New York, who wouldn't deliver them up until the matter was adjusted. We would not have given them up without something in their place, whether they were in New York or Omaha. I swear that I didn't take the notes as security for money loaned to Redick, but I bought them. If the rate at which we took the paper was greater than 12 per cent. it would not be a clerical error. If it was simply 12 per cent. it was in accordance with what we intended to do. We claim the right to take interest at that rate.

Redirect examination:

In the batch of paper that Redick brought us, and which I refused to discount, were several Spitley notes, of which there were five or six in all, and we took two. They were $1,000 each.

HENRY YATES sworn for defendant.

I am cashier of defendant, and have been cashier or assistant cashier ever since its organization. $31,000 of the railroad bonds mentioned by Redick and Kountze were sold by Redick, and the proceeds passed to his credit in the bank, and against the same was charged one of the Seivers notes, which had been put into judgment. I was present and heard part of the conversation between Redick and Kountze about the bank taking the Seivers notes. It was in the front office, Redick I think setting by Mr. Kountze at his desk, I at my desk, Kountze and I being back to back. Redick said, "I want the bank to take this paper out and out."

Kountze answered, "The bank cannot take it without your endorsement." Redick said, "Well, then, I will endorse it." Kountze and I then went to the rear of the bank, examined the paper, and selected
24 such as we thought the bank could reasonable carry. Mr. Kountze returned the remainder to Mr. Redick.

Cross-examined:

We bought the paper for $10,513.31. Redick paid the Griffin $2,240, with $4.46 interest, took up the two notes, one for $5,000, the other for $6,082.32, leaving balance against him of $2,437.06, for which he gave his note. We bought the Seivers notes and discounted his. The difference between the purchase of a note and making a loan is this: when we buy a note we buy it of anybody, if it has had its inception in a previous transaction. A or B may make his note to C as any other piece of property for whatever we agree upon. When we discount a man's note it is a regular loan made by him. The transaction of our taking the Seivers notes, and Redick's note for the balance, did not grow out of the previous transaction of Redick's borrowing $11,000 of us. His notes were not then due. When we took the Seivers notes from Redick we diden't really change his obligation from a personal*ly* one on his notes to an endorsement of the Seivers notes. When we discounted the Seivers notes Redick stated that he wanted to clean up the whole thing. I am not sure that we considered the Seivers notes with Redick's endorsement and with Seivers and Crosby better than Redick's notes. The said road bonds were left with us as collateral. When we took the Seivers notes we did not investigate the security much. We thought Redick's personal endorsement good. If Redick brought to us Valentine's note at 6 months, and we knew that he had obtained it for his accommodation, I should call it a loan. If he bought the note in any business transaction, I should call it a purchase.

Redirect examination:

After we took the Seivers notes they were subject to Redick's
25 order. We retained $2,800 of the proceeds of the bonds, because the bank has a right to the balances of its customers for any indebtedness he may have to the bank.

Here the deft. rested.

The plaintiff then read in evidence the following paragraph from the bill of foreclosure of the bank upon the Seivers mortgage:

"And your orator further shows unto your honors that on the 8th day of December, 1875, the said John I. Redick was, and for a long time prior to that had been, indebted to your orator in a large sum of money, that is to say, a sum much larger than that mentioned in and secured by said notes and mortgages, and in order to secure the payment thereof to your orator, he, the said Redick, endorsed and delivered the said notes to your orator, and also duly assigned said mortgage to it, and with the said sum so due and owing on said notes and mortgage your orator gave said Redick forbearance on his said debt to it."

The whole of said bill was then introduced in evidence, a copy of which is hereto attached.

The final decree in said foreclosure suit was also introduced in evidence, of which the copy is hereto attached.

The above is the substance of all the testimony adduced on either side.

The said judge, upon the request of the plaintiff, then instructed the jury as follows:

If the jury find, from the evidence, that the plaintiff was a customer at the defendant's bank, and that the notes described in the petition were discounted by the defendant for the plaintiff, upon his endorsement, with the understanding that he was to be held for the ultimate payment of the notes, then such discounting of the notes by the defendant was a loan of money to the plaintiff, and if the defendant discounted them beyond the lawful rate of interest the transaction was usurious.

To which the defendant then and there duly excepted.

26 If you find from the evidence that the notes mentioned in the petition were discounted by the defendant for the plaintiff at a greater rate than 12 per cent. per annum for a period longer than one year to apply on a previous debt from plaintiff to defendant, and that plaintiff has since paid the defendant the full amount of the notes with the interest thereon, then the transaction was usurious, no matter what the intention of the defendant was in taking such usurious interest, even though its officers thought or believed such a mode of calculating discount was lawful, there being no miscasting or other mistake of fact.

To which the defendant then and there duly excepted.

The payment and receipt of an unlawful rate of interest is of itself prima facie evidence of a corrupt agreement, and this being shown the burden of the proof is on the defendant to make it appear that there was no corrupt intent, although the defendant might not have intended to violate the statute, yet if to' much interest was taken upon a mistaken supposition that its mode of calculating discount was lawful, this would not be a mistake of fact which would excuse or relieve the defendant, but it would be a mistake of law for which the defendant would be held responsible, and the agreement would be corrupt in law, whatever the actual intention of the defendant may have been as to taking unlawful interest, no mistake of fact, such as error in calculating, being shown.

To which the defendant then and there duly excepted.

I charge you that a debt due or to grow due is as much the subject of lending and borrowing as money, and in such case the creditor may be the lender and the debtor the borrower, and if you find from the evidence that in consideration of a further forbearance the defendant received a new security from the plaintiff for an existing debt it could not enlarge the amount due by exacting anything by way of interest or exchange for the additional risk it run by an extension of credit, nor on the opinion

27 it might entertain as to punctuality of payment or the ultimate safety of its debt.

To which the defendant then and there duly excepted.

If you find from the evidence that in December, 1875, Redick was indebted to the bank in the sum of about $12,000.00, and that in order to obtain an extension of time, and in part payment of this debt, he turned into the bank the four notes made by Seivers, with his endorsement upon them, and that the bank discounted these notes at a rate greater than 12 per cent. per annum from the full time they had to run up to maturity, and that the plaintiff has since paid the defendant the full amount of the notes, then I charge you that the bank received a greater rate of interest than allowed by law, and that the plaintiff is entitled to recover.

To which the defendant then and there duly excepted.

I charge you that if you find from the evidence that the defendant discounted these notes for the plaintiff for the time set forth in the petition at a rate greater than 12 per cent. per annum, and that the said plaintiff was required by said defendant to endorse said notes, and that the defendant required him to pay him the full amount of said notes, and that the said discounted notes were for the forbearance of a debt before that time owing by said plaintiff to the bank, then the transaction was in violation of the usury laws of Nebraska, and you should find for the plaintiff.

To which the defendant then and there duly excepted.

From the time when the defendant advanced to Redick or gave him credit for $6,993.34, the face of the notes less the discount up to the final payment on March 5, 1880, and after the judgment was obtained on the note first described in the petition, the defendant could have elected to apply said judgment as a credit upon the principal of said loan and to demand payment of the balance of the principal only, waiving any interest,
28 and thus the penalties for usury could have been avoided.

And the jury are instructed that as the judgment recovered was less than the principal of the loan such judgment does not bar the plaintiff from recovering twice the entire interest paid by him to the defendant, provided that they find the transaction usurious.

To which the defendant then and there duly excepted.

If you find for the plaintiff you will first ascertain the full amount of interest paid by him on the usurious transaction, and your verdict will be for twice the full amount of interest so paid. I charge you that in reaching your conclusion as to whether there was a loan or purchase of notes by way of discount, you should take into consideration the fact that Redick made himself liable by endorsement on the paper; that he afterwards foreclosed the mortgage, or had it done without expense to the bank, and paid cost of foreclosure and of all legal proceedings touching these notes, and that after such transfer of the notes he delivered to the bank additional security for the same.

To which the defendant then and there duly excepted.

The said judge further instructed the jury upon the request of the defendant as follows:

It was competent and legal for the parties to this suit in the transaction alleged in the pleadings to agree upon a rate of interest not exceeding twelve per cent. per annum, and to expressly agree that interest at that rate should be paid by the plaintiff in advance, and such agreement between them is not rendered illegal or usurious by the taking interest in advance for the full time the loan was to run, whether that time was one or more years.

If the jury believe from the evidence that the transaction alleged by the plaintiff in his petition as made December 18, 1878, was a sale
29 by him to defendant of the notes and mortgage of Seivers, then the jury must find for the defendant.

In determining whether the transaction was a sale of the Sievers notes and mortgage by Redick to the bank, or a pledge of them as collateral security for a loan by the bank to Redick, the jury must consider the fact that no note or evidence of debt was given by Redick for the sum which he claims to have borrowed, and the further fact that Redick did give a

note for a balance of his debt to the bank, and also the fact that Redick offered the bank notes which it refused to take in the transaction, and further that the two notes for $5,000, and the other for $6,000, were not due and would not become due until in March, and that the bank already held the railroad bonds to secure these notes, and all the other facts and circumstances of the case as shown in the pleadings and proved in evidence.

It is incumbent on the plaintiff to establish by a preponderance of evidence his allegation that the notes of mortgage of Sievers were taken by the defendant for the purpose of taking usury, and unless the jury are satisfied that the plaintiff has established that fact by a preponderance of testimony they must find for the defendant.

You are instructed that the fact that this transaction has been called by the parties a discount, or that a deduction from the securities were at a rate usual in making discounts, if you find from the evidence such to be the fact is not material; the nature of the transaction, whether it was a sale of the securities or a loan, is to be determined by the facts and circumstances as shown in the evidence.

Upon his own motion the said judge also instructed the jury as follows:

GENTLEMEN OF THE JURY: Since this trial began I have
30 given the matter some thought, and have investigated the question growing out of the controversy the best I could. When I commenced the examination I was considerably confused over the construction of section 5198, which fixes the penalty for a transaction such as is here described in the petition, but after a careful examination of a case in the 8th of Otto, wherein the Supreme Court has had this question under consideration, I suppose it is no longer an open question. The first subdivision is as follows, viz:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceeding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon.

"In case the greater rate of interest has been paid, the person by who' it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

Now, according to the construction that section has received, that simply applies to a transaction wherein a note has been discounted and suit is brought to enforce the obligation. It only applies to a transaction wherein a contract has been made to take, receive, or charge a rate of interest, that exceeds 12 per cent. The following provision applies only to a transaction wherein the interest has been paid: In case the interest has been paid the plaintiff recovers, if he recovers at all, twice the interest that has been paid. The result of that is that if suit had been brought against Judge Redick,
and if he had succeeded in establishing such a defense as he might have
31 made to a usurious transaction, then the bank could have recovered the principal only. That would have been the extent of the liability of this defendant. But when no defense was made, and the money was actually paid, then if the injured party sees proper to institute his suit, the result

is different. In one case where the defense has been made, the effect would be simply the forfeiture of the amount of the interest secured by the note, but in the other case, where the injured party had paid the illegal interest, he is entitled to recover, if he is entitled to recover at all, not only the illegal interest, but the legal interest, together, and twice the amount. Where suit is brought to recover illegal interest, then the penalty is twice the whole amount of interest paid.

The plaintiff has asked a large number of written instructions, a portion of which I give and a portion I refuse; and what is true of the plaintiff is also true of the defendant.

Now, stripping this case of all unnecessary surroundings, it seems that you should first find (and it is about all that is necessary to be determined here) whether the Sievers notes were really sold to the defendant or taken as security; and if taken as security simply, then at that time was there usurious interest contracted for and afterwards paid. I think that is about all the issues as presented by the pleadings and shown by the proof. If you find that the bank did not purchase the Sievers notes, then the other theory must be taken to be correct as stated by the plaintiff—that the notes were taken as security in the place of the other notes taken up at the time. If you find the notes were taken by the bank for the purpose of better securing the five and six thousand dollar notes, then the question is whether in making up the rate of discount the bank received more than 12 per cent. If it did, the penalty is incurred, and the
32 plaintiff would have the right to recover it back.

Supposing the testimony is conflicting, it is for you to determine on which side the weight of testimony is. How are you to determine? By the testimony of Judge Redick fortified, perhaps, by the bill in the other case on the one side, and the testimony of Kountze and Yates on the other. You have the testimony of Judge Redick and Kountze and Yates, and the bill filed by the bank against Sievers on those notes. Is the testimony of Judge Redick fortified by this bill, or the testimony of Kountze more satisfactory upon that point? This is what is relied upon by the plaintiff, as found in the bill: "And your orator further shows unto your honors that on the 8th day of December, 1875, the said John I. Redick was and for a long time prior to that had been indebted unto your orator in a large sum of money—that is to say, a sum much larger than that mentioned in and secured by said notes and mortgages; and in order to secure the payment thereof to your orator, he, the said Redick, endorsed and delivered the said notes to your orator, and also duly assigned said mortgage to it, and with the said sum so due and owing on said notes and mortgage your orator gave said Redick forbearance on his debt to it."

This paper from which I read is the bill which was filed in the court by the First National Bank to foreclose a mortgage executed by Sievers, and to enforce the payment of the notes mentioned in this suit, and that is the one clause upon which the plaintiff relies to show that his version of the transaction is correct. Now, if what is stated there is true, and you are satisfied from the evidence that it is so, it seems to me there cannot be much doubt about the manner in which the bank received the notes.
33 Were the Sievers notes given to the bank to secure payment of Redick's notes and, for the purpose of securing enlargement of the time of payment, forbearance of the debt of Redick? If that theory is

correct, and the bank received usurious interest, it would be liable. On the other hand, if the theory which has been testified to by Kountze and Yates is true, the bank must have purchased the said notes.

Now, whatever the bank may have paid to purchase said notes is not questioned here, for the reason that if it did purchase said notes, whether or not it had the absolute right to do so, is not in issue here. I am not prepared to say that it would have the right to do that, but assuming that the theory of the defendant is correct, it is not a subject of inquiry in this suit.

Now, if you are satisfied that no absolute sale was made at that time, then it would become your duty to ascertain what amount was really received by the bank at the time the paper was discounted. It seems to me there is a great diversity of opinion as to what is really meant by discount. I called the attention of counsel to the matter, and asked counsel on both sides to examine it and show me how they arrive at a correct conclusion, but it was not done; I don't know why. I don't know whether there was a misunderstanding or not. I have felt bound to present what I understand is a correct rule to ascertain lawful discount. If you find that these notes were taken by the bank as security, then you have this question to determine, and you may perhaps experience considerable difficulty in determining just what the discount ought to have been. Discount is not interest, and there is a very material difference between the two, and there is altogether a different rule for ascertaining the amount of the discount and ascertaining the amount of the interest. The section of the law
34 from which I read expressly forbids national banks discounting paper at a greater rate than 12 per cent.; that is, if there was no sale of the notes. If there was a sale I am not prepared to say whether the bank would have the same right to purchase as individuals; that question is not necessary in this case.

Now, if you get far enough along to make it necessary to ascertain what amount of discount was really paid you will have to figure out for yourselves whether the bank received too much. One rule for ascertaining discount is this: Take a note for $100, for illustration—I don't know that I can make myself understood fully; if I don't it will be my fault. We will take a note for $100 due in 12 months. You want to discount it and agree on the rate 12 per cent. Now one rule is this: Take one dollar and the rate per cent. and divide the $100 by that, and the product is what the party could be entitled to receive. To find the discount, take one dollar, add 12 cents, and divid' $100 by that; it gives $89.28, and that is the identical sum that a person would be entitled to receive when he had $100 discounted. A good many people would think that a person would be entitled to receive $88.00 and that the person who discounted the note should retain $12, but that is interest, that is not discount. For the purpose of showing you that this system is correct it is only necessary to take the sum of $89.28 and multiply by 12 per cent.; that is the sum the law allows:

Rate per cent., 1.12)100.00(89.28$\frac{64}{112}$, am't advanced.
89.6

104.0
100.8

3.20
2.24

960
896

64 remainder.

35 $89.28, amount advanced.
12, rate per cent.

$10.71.36. Interest on the amount advanced at 12 per cent. per annum would be $10.71.

If the sum of $100, due in one year, will be discounted 13 per cent., the person having the note discounted will receive $88.49, and if the party discounting should retain $12.00, which would be interest on $100 at 12 per cent. per annum, then the note would be discounted at a rate nearly equal to thirteen and a half per cent. per annum. These principles apply to the note in question, and will determine the rate of discount the bank was authorized to retain if it took the Sievers notes as security.

If you apply the other rule contended for by defendant to a note due in eight years and four months, at 12 per cent., the note would be worthless; there would be nothing if the other principles is to be applied. That is not the correct principle. It is something that is done for a purpose, but it is not lawful discount. I say here and now, that a note that has ten years to run is worth something, and when it is discounted under well known rules, something would come out of it. Now, it seems to me, that if you apply good sense to this whole transaction there is not much difficulty in it.

By a JUROR. Do you figure out three days' grace?

The COURT. You must do your own figuring; this is just given as a general idea; that is, to determine the correct way. I have not looked into an arithmetic for several years, but that was one of the rules twenty or thirty years ago. I suppose it has been improved on since.

I suppose I ought to say that this law is penal and it ought to be construed strictly; and before the defendant can be held responsible the proof should be entirely satisfactory. Now, it is true that national banks
36 have very many privileges and rights conferred by the law from which they derive their existence that are not conferred upon other banking institutions, but while there are extraordinary rights there are also extraordinary penalties. The General Government taxes them heavily. All these facts are to be taken into consideration. Penalties, when they are imposed, are for good purposes. If national banks violate the law, they must suffer the penalty, as other institutions. They have the same rights and are subject to the same liabilities as other institutions.

Mr. WOOLWORTH. We except to so much of our requests as are refused, and we except to so much of the oral charge as relates to interest.

To the last clause of the said charge the defendant duly excepted.

The above are all the instructions of the court to the jury before it retired.

The defendant further requested the said judge to instruct the jury before it retired as follows:

In no event can the jury find for the plaintiff for any sum whatever on account of interest upon the note for $2,800 at two years, first in the petition alleged, the interest reserved upon which note the plaintiff alleges is, $371.46, and twice which sum he claims in this action.

In this action the plaintiff can in no event recover more than twice the amount taken by the plaintiff in excess of legal interest; that is, in excess of 12 per cent. per annum. He cannot recover twice the amount of the whole interest paid by him.

It is admitted in the pleadings that the First National Bank of Omaha brought its suit in this court against Sievers, Crosby, and Redick for the foreclosure of the mortgage mentioned in the pleadings, and that a decree of foreclosure of the mortgage and sale of the mortgage premises was rendered in said suit. By this decree the plaintiff is estopped to al-
37 lege that the notes of the transfer thereof by Redick to the bank was usurious, and for that reason the plaintiff cannot recover in this action, and the jury must find for the defendant.

Each of which requests the said judge refused, and the defendant duly excepted.

Thereafter the jury retired to consider of their verdict.

Afterwards, they not having agreed, came into the court, when the court read to them again, at their request, the paragraph of the said bill to foreclose the mortgage above mentioned, to which the defendant duly excepted.

The jury having again retired to consider of their verdict, again not having agreed, came into court and asked for further instructions, when the said judge directed them as follows:

By what is said in this bill filed by the bank against Sievers, the bank would notwithstanding be the legal owner and holder of the Sievers notes, and could at any time proceed to enforce collection of all securities for the purpose of raising money to apply on Redick's debt. In view of that fact the bank would be the legal owner and holder until Redick would in some other way pay or secure the principle debt. The bank could institute suit in its own name and recover on it, so far as that the ownership or title would be in the bank, even if he delivered them to the bank for collateral to his debt, for the bank could institute suit and apply the proceeds to the debt, either with or without the consent of Redick, even if everything said in the bill is true. I think that disposes of that question.

Matters of fact you will have to determine from the testimony. I won't express an opinion of that. If the notes were disposed of to the bank as collateral, the bank could institute a suit after the debt became due and before Redick had otherwise discharged the debt. After he had
38 discharged the debt it would be otherwise.

To which the defendant then and there duly excepted.

Thereupon they again retired to consider of their verdict, with which they afterwards returned into court, as follows:

"We, the jury empanneled and sworn in this cause, find upon the issues joined for the plaintiff, and we find the amount of interest unlawfully re-

ceived by the defendant to be $3,006.66, and we find for the plaintiff in twice said sum, to wit, $6,013.32."

The defendant within three days from the rendition of said verdict filed a motion for a new trial, as follows:

"Now comes the defendant, by James M. Woolworth, its attorney, and moves the court to set aside the verdict of the jury rendered in this action, and for a new trial thereof, on account of divers errors committed by the court on the trial thereof, among which were the following:

"1. Admitting the paper purporting to show how the plaintiff took up the Sievers notes, notwithstanding the defendant's objection.

"2. Refusing to permit the defendant to show the custom of banks in making loans on collateral security by taking a note for the sum loaned.

"3. In giving to the jury requests of the plaintiff to charge.

"4. In refusing to direct the jury as requested by the defendant in 5th and 6th causes of its requests.

"5. In charging the jury in respect of the rule of damages and the mode of calculations, discounts, and in respect of interest.

"6th. After the case had been committed to the jury and they had retired to consider of their verdict the court read to them certain testimony, to wit, part of the bill in equity in the case of the Bank vs. Sievers without the remainder."

39 Which motion the said court took time to consider at the term of January, 1881, to wit, on the 10th of February, 1881, the following proceedings were had:

This cause coming on to be heard upon the motion of the defendant herein to set aside the verdict and for a new trial, the court on consideration thereof doth overrule the same, and thereupon in open court the plaintiff offered to remit from the amount of said verdict the sum of one thousand thirteen $\frac{32}{100}$ dollars, and the court upon due consideration thereof allowed said remittiter and ordered the same to be duly entered of record. And thereupon it is ordered and adjudged by the court that the said plaintiff have and recover from the said defendant, the First National Bank of Omaha, the sum of five thousand dollars, with costs of suit taxed at dollars, and that execution issue therefor."

On the 17th of February, 1881, forty days were given to the defendant without consent of pl'ff to prepare and serve its bill of exceptions.

"The last day of the session of the November term o' 1880 of the court at which said cause was tried was the 28th day of December, 1880, and the January term commenced January 3rd, 1881."

At the settlement of this bill of exceptions the plaintiff objected to the allowance thereof, for the reason that it was not reduced to writing or served on the plaintiff within 15 days after the close of the November term, 1880, nor was it in fact served on him till February 26, 1881, being over 50 days after the close of the term at which the cause was tried, and the defendant prays the said judge to sign and seal this its bill of exceptions and order the same made part of the record, both which is done this 5th day of September, 1881.

The plaintiff protests against the signing and filing of this bill of exceptions, for the reasons that the same was not presented in time,
40 and because the judgment is not for a sum exceeding $5,000, so that the same might be received by the Supreme Court.

The writ of error was allo'ed by Mr. Justice Miller, on the 25th day of March, 1881, and therefore, in the opinion of the undersigned, these objections are for the Supreme Court alone to determine.

[SEAL.] ELMER S. DUNDY, *Judge.*

Said bill of exceptions is endorsed as follows: No. 312 E. In the circuit court of the United States for the district of Nebraska. John I. Redick vs. The First National Bank of Omaha. Bill of exceptions. Filed Sept. 5th, 1881. Watson B. Smith, clerk.

41 In the circuit court of the United States for the eighth judicial circuit and district of Nebraska.

To the honorable judges of said circuit court of the United States:

The First National Bank of Omaha, which is, and for ten years and more last past has been, a corporation duly organized under an act of the Congress of the United States of America entitled "An act to provide a national currency secured by a pledge of United States and to provide for the circulation and redemption thereof," approved Feb. 25th, 1863, and located and doing business in the city of Omaha, in said district, brings this its bill against Detlief Seivers of Fremont, and a citizen of the State of Nebraska, Elisha O. Crosby of Fremont, and a citizen of the State of Nebraska, and John I. Redick of Denver, and a citizen of the State of Colorado. And thereupon your orator complains and says that said Detlief Seivers did, on the 12th day of January, 1875, at said Fremont, Nebraska, duly make and execute among others his three certain promissory notes in writing of that date, and then and there delivered the same to said Elisha O. Crosby, and thereby, for value received, did promise to pay to said Elisha O. Crosby, or order, in one of said notes, the sum of $2,600.00 in three years after the date thereof, in another of said notes the sum of $2,400.00 in four years after the date thereof, and in another of said notes the sum of $2,500.00 in five years after the date thereof, and that for the purpose of securing the payment of said notes the said Detlief Seivers did, at the same time, duly execute and deliver to said Elisha O. Crosby his certain deed in writing of the same date, and thereby conveyed to said Elishal O. Crosby, his heirs and assigns, in fee simple, the following lands and tene-

42 ments, situate in Dodge County, State of Nebraska, and described as follows, to wit: All of section thirty-five (35) and the southeast quarter of section twenty-six (26), in township eighteen (18), range seven (7) east of the sixth principal meridian, containing eight hundred acres of land, more or less, according to the survey thereof by the Government of the United States, and which said deed of conveyance had a condition thereunder written providing that if the said Detlief Seivers should well and truly pay, or cause to be paid, the said sums of money in said notes mentioned according to the tenor and effect of said notes, and should duly keep and perform all the other covenants in said deed contained on the part of said Seivers to be kept and performed, then said deed should be null and void; but is said sums of money or any part thereof was not paid when the same became due and payable, or if the taxes and assessments against said premises were not paid at or before the time the same by law became delinquent, then, by the express terms of said deed, the whole of said sums

should immediately become due and payable, and in case of foreclosure of said mortgage it was therein further expressly agreed that a reasonable sum, to be determined by the court, should be awarded, in addition to the judgment, as an attorney's fee, which fee, by the terms of said deed, was not to be less than $200.00.

And your orator further shows unto your honors that said deed of mortgage was duly recorded in the office of the county clerk of said Dodge County on the 13th day of February, A. D. 1875, in book "F" of mortgages, at page 327; and that thereafter, to wit, on the 23rd day of February, A. D. 1875, the said notes and said deed of mortgage were, by said Crosby, for a valuable consideration to him in that behalf paid, duly endorsed, transferred, and assigned to said John I. Redick, who thereupon became the lawful owner and holder of said notes and mortgage.

And your orator further shows unto your honors that on the 8th day of Dec., 1875, the said John I. Redick was, and for a long
43 time prior thereto had been, indebted unto your orator in a large sum of money, that is to say, a sum much larger than that mentioned in and secured by said notes and mortgage; and in order to secure the payment thereof to your orator he, the said Redick, endorsed and delivered said notes to your orator, and also duly assigned said mortgage to it, and with the said sum so due and owing on said notes and mortgage your orator gave said Redick forbearance of his said debt to it, and so your orator on said day became and was, and ever since has been, the true and lawful owner and holder of said notes and mortgage.

And your orator, further complaining, says that said Detlief Seivers has failed and neglected to pay, or cause to be paid, the taxes and assessments duly assessed and levied against said premises at or before the time the same by law became delinquent; that the tax for the year 1875, duly assessed and levied against premises and amounting to the sum of 109\frac{46}{100}$ became by law delinquent May 1st, 1876, yet the said Seivers hath not paid said tax or any part thereof, and the same still remains delinquent and payable; that the tax of 1876, duly assessed and levied against said premises and amounting to the sum of $102.00 became due January 1st, 1877, and will become by law delinquent May 1st, 1877, yet the said Seivers hath not paid the same or any part thereof, and the whole thereof remains due and payable.

And your orator further shows unto your honors that no action at law or otherwise has ever been commenced on said notes or mortgage, or to recover the debt represented thereby, or any part thereof, and that no part thereof has been collected or paid, and that by reason of the premises and the failure and neglect of said Seivers to pay or cause to be paid the said taxes due and delinquent as aforesaid the whole of said debt
44 is now due and payable unto orator, which it claims with an attorney's fee of $200.00 and costs of this action. And your orator therefore prays:

I. That said Detlief Seivers, Elisha O. Crosby, and John I. Redick may be made parties to this bill, and required to answer thereto.

II. That an account may be taken by your honors of the amount due your orator in the premises.

III. That unless such amount is paid within a reasonable time, to be fixed by your honors, that an order of sale may issue herein to some

proper person to be appointed by your honors as master commissioner for that purpose, commanding him to cause said lands and tenements to be advertised and sold in such manner as your honors may direct.

IV. That the proceeds arising from such sale be applied in satisfaction of the amount so found due by your honors.

V. That for any deficiency remaining due to your orator after so applying the proceeds arising from said sale your orator may have judgment and execution, the same to be enforced according to the respective liabilities of said parties, first, against said Detlief Seivers as maker of said notes; second, against said Elisha O. Crosby as the first endorser thereof; and third, against said John I. Redick, the second endorser.

VI. That upon said sale being made, the said Seivers, Crosby, and Redick be forever barred and foreclosed of all right, title, interest, or equity of redemption in or to said premises, or any part thereof.

VII. And that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Detlief Seivers, Elisha O. Crosby, and John I. Redick, defendants, commanding them, and each of them,
45 on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court then and there to answer all and singular the premises, and to stand to, perform, and abide by such further order, direction, and decree as may be made against them, or either of them. And your orator as in duty bound will ever pray.

W. J. CONNELL,
Solicitor and of counsel for complainant.

DISTRICT OF NEBRASKA, *ss:*

Herman Kountze, being first duly sworn, says he is president of said First National Bank of Omaha, a corporation organized, located, and doing business as set forth and stated in the foregoing petition; that affiant has read said petition, and knows the contents thereof, and believes the facts therein stated to be true.

HERMAN KOUNTZE.

Subscribed in my presence, and sworn to before me this 2nd day of April, A. D. 1877.

WATSON B. SMITH, *Clerk.*

Said bill is endorsed as follows: No. 62, D. U. S. circuit court, district of Nebraska. First National Bank of Omaha vs. Detlief Seivers et als. Bill. Filed Apr. 12, 1877. Watson B. Smith, clerk. W. J. Connell, solicitor and counsel for comp't.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, certify that I have compared the annexed
46 copy of bill in case of First National Bank vs. Detlief Seivers et

als. with the original on file in this office, and that the same is a correct transcript thereof and of the whole of said original.

In testimony whereof, I have caused the seal of said court to be hereto affixed at the city of Omaha, in said district, this 12th day of April, 1877.

[SEAL.] WATSON B. SMITH, *Clerk.*

47 At a session of the circuit court of the United States for the district of Nebraska, begun and held pursuant to adjournment at the United States court-room, in the city of Omaha, on the 8th day of December, 1877, the honorable Elmer S. Dundy being present and presiding in said court, the following among other proceedings were had and done, to wit:

In the case between First National Bank of Omaha and Detlief Seivers et als., def'ts.

This cause came on to be heard and was argued by counsel; and on application of Tyler, by E. Wakeley, his att'y, leave is granted to said Tyler to withdraw his application to be made a party hereto, the said complainant dismissing as to E. O. Crosby and John I. Redick without prejudice to future actions; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

On reading and filing the report of Watson B. Smith, master in chancery of said court, which report bears date the 8th day of December, in the year one thousand eight hundred and seventy-seven, and was in pursuance of an order of this court heretofore made in this cause, referring it to Watson B. Smith, master as aforesaid, to compute the amount due to the complainant on the notes and mortgage mentioned and set forth in the bill of complaint, from which it appears that there was due to the said complainant at the date of said report for said principal and interest, including taxes paid by comp't, the sum of seven thousand four hundred and eighteen and 88-100 dollars ($7,418.88), and the further sum of two hundred dollars (200.00), which is hereby allowed as a reason-
48 able attorney's fee herein. And on motion of Redick and Connell, counsel for the complainant, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree, that the said report, and all things therein contained, stand ratified and confirmed. And it is further ordered, adjudged, and decreed, that the said defendant Seivers pay or cause to be paid to the said complainant or to its said solicitors the amount so reported due as aforesaid, together with the interest after the 12th day of January, 1878, in the sum of twenty-six hundred dollars ($2,600.00), interest on the sum of two thousand four hundred dollars ($2,400.00) after January 12th, 1879, and interest after January 12th, 1880, in the sum of twenty-two hundred dollars ($2,200.00), all at the rate of 12 per cent. per annum and costs, on or before the 26th day of December, in the year one thousand eight hundred and seventy-seven, and in default thereof that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the complainant for the principal, interest, and costs in this case and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of Wm. Daily, U.

S. marshal for said district, who is hereby appointed master commissioner for that purpose at any time after the said 26th day of December, in the year one thousand eight hundred and seventy-seven; that the said sale be made at the north door of the United States court-house, at Omaha, Nebraska; that the said Wm. Daily, master, give public notice of the time and place of such sale, according to the course and practice of this court; and that the complainant or any of the parties in this cause may become the purchaser, that the said Wm. Daily, master, execute a deed to the purchaser or purchasers of the mortgaged premises on the confirmation of the said
49 sale; and that the said Daily out of the proceeds of said sale pay to the complainant, or its solicitor, its costs in this suit to be taxed, and also the amount so reported to be due as aforesaid, together with the legal interest thereon as hereinbefore stated, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the said Wm. Daily, master, take receipt for the amount so paid and file the same with his report; and that he bring the surplus moneys arising from said sale, if any there be, into court without delay, to abide the further order of this court.

And it is further ordered, adjudged, and decreed that the defendant and all persons claiming, or to claim, from or under said Detlief Seivers be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof. And it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and any of the parties to this cause who may be in possession of said premises or any part thereof, and any person who since the commencement of this suit has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the deed for such premises and a certified copy of the order confirming the report of such sale after such order has become absolute. And it is further ordered and decreed that if the moneys arising from said sale shall be insufficient to pay the amount so reported due to the complainant, with interest and costs and expenses of sale as aforesaid, that said Wm. Daily, master, specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report the complainant shall be at liberty to apply to the court for an order that the person Detlief Seivers, who is personally liable for the debt secured by the
50 said mortgage pay to the complainant the amount of such deficiency, with interest thereon as aforesaid, and that the complainant have execution therefor. The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, are as follows, viz: All of section thirty-five (35) and the southeast quarter of section twenty-six SE. (26), in township eighteen (18), range seven (7) east of the sixth principal meridian in Dodge County, Nebraska, containing eight hundred acres of land, more or less, according to the survey thereof by the Government of the United States.

THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Watson B. Smith, clerk of the circuit court of the United States for

the district of Nebraska, do hereby certify that the above and foregoing is a true copy of the final decree entered upon the journal of the proceedings of said court in the cause therein entitled; that I have compared the same with the original entry of said order, and it is a true transcript therefrom, and of the whole thereof.

Witness my official signature and the seal of said court, at Omaha, in said district, this 8th day of December, A. D. 1877.

[SEAL.] WATSON B. SMITH, *Clerk.*

51 Thereupon, at the November term of said court, on the 29th day of November, 1880, said cause came on for trial before the court and a jury, and said trial was continued from day to day until the 2nd day of December, 1880, when the following proceedings were had, to wit:

Verdict.

JOHN I. REDICK
vs.
THE FIRST NATIONAL BANK OF OMAHA.

Now on this day the jury heretofore empanneled and sworn herein come into open court and present to the court their verdict in writing, which is in words and figures following, to wit:

United States circuit court, district of Nebraska.

JOHN I. REDICK, PLAINTIFF,
vs.
THE FIRST NATIONAL BANK OF OMAHA, DEFENDANT. } Verdict.

We, the jury empanneled and sworn in this cause, find upon the
52 issues joined for the plaintiff. And we find the amount of interest unlawfully received by the defendant to be $3,006.66.

And we find for the plaintiff in twice said sum, to wit, $6,013.32.

R. A. BROWN, *Foreman.*

Thereupon at the January term of said court, on the 10th day of February, 1881, the following proceedings were had in said case, as appears of record on folio 775, Journal F of said court.

JOHN I. REDICK, PL'FF,
vs.
FIRST NATIONAL BANK OF OMAHA, DEF'T.

This cause coming on to be heard upon the motion of the defendant herein to set aside the verdict, and for a new trial, the court on consideration thereof doth overrule the same, and thereupon in open court the plaintiff offered to remit from the amount of said verdict the sum of one thousand thirteen $\frac{32}{100}$ dollars, and the court upon due consideration

thereof allowed said remittiter, and ordered the same to be duly entered of record, and thereupon it was ordered and adjudged by the court that the said plaintiff have and recover from the said defendant, The First National Bank of Omaha, the sum of five thousand dollars, with cost of suit taxed at dollars, and that execution issue therefor.

Thereupon, afterwards, to wit, on the 5th day of September, 1881, a citation was issued in said case, of which the following is the original:

53 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To John I. Redick, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the First National Bank of Omaha is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 5th day of September, 1881.

ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 312 E. United States circuit court, district of Nebraska. The First National Bank of Omaha, pl'ff in error, vs. John I. Redick. Citation. Filed Sept. 27th, 1881. Watson B. Smith, clerk.

53½ DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 27th day of September, 1881, I received this citation, and on the 27th day of September, 1881, I served the same upon the within-named John I Redick in Douglas County, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska.
By R. E. ALLEN,
Deputy United States Marshal.

Marshal's costs, $2.06.

54 Thereupon, afterwards, to wit, on the 5th day of September, 1881, a bond was filed in said case, which said bond is in words and figures following, to wit:

55 Know all men by these presents that we, The First National Bank of Omaha, as principal, and Herman Kountze and Henry W. Yates, as sureties, are held and firmly bound unto John I. Redick in the full and just sum of eleven thousand dollars, to be paid to the said John I. Redick, his certain attorney, executors, administrators, or assigns. to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents,

Sealed with our seals, and dated this 26th day of February, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at a term of the United States circuit court for the district of Nebraska, in a suit depending in said court between John I. Redick, plaintiff, and The First National Bank of Omaha, defendant, a judgment was rendered against the said First National Bank of Omaha, defendant, and the said First National Bank of Omaha having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John I. Redick, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said First National Bank of Omaha shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

FIRST NATIONAL BANK OF OMAHA,
By H. KOUNTZE, *Pres.* [SEAL.]
H. KOUNTZE. [SEAL.]
H. W. YATES. [SEAL.]

Sealed and delivered in presence of—

Approved by—
ELMER S. DUNDY, *Judge.*

(Indorsed:) No. 312 E. John I. Redick vs. The First National Bank of Omaha. Bond. Filed Sept. 5, 1881. Watson B. Smith, clerk.

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John I. Redick, plaintiff, and the First National Bank of Omaha, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court, the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER, *Judge.*

(Indorsed:) No. 312 E.

57 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios from one to fifty-five contain true and faithful transcripts of the pleadings, process, and proceedings of record and on file in my office as said clerk in the case of John I. Redick vs. The First National Bank of Omaha, and that a copy of the writ of error and citation has been lodged and the same remain in my said office.

Witness my hand and the seal of said court at Omaha, this 30th day of September, 1881.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsement on cover:) No. 610. The First National Bank of Omaha, plaintiff in error, vs. John I. Redick. Nebraska C. C. U. S. Filed 4th October, 1881.

No. 330.

110-224

OFFICE SUPREME COURT U. S.
FILED
JAN 15 1884
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF OMAHA,

PLAINTIF IN ERROR,

vs.

JOHN I. REDICK.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

I am very well aware that in several recent judgments of the Court it has been held that if the Circuit Court accept the remittur by a plaintiff of so much of a verdict as reduces it to $5,000, there can be no review here of the judgment. But I submit that where it appears that the action of the Court below was for the evident purpose of defeating the jurisdiction of the Supreme Court, the rule ought not to apply.

This action was brought for the recovery of twice the amount of excessive interest alleged to have been reserved by the Bank upon the purchase of commercial paper from Redick. The amount of interest so reserved is alleged in the petition to have been $4,754.94, and judgment was prayed for $9,509.88. Under instructions by the Court the verdict was for $6,013.32, which was twice the amount of the interest found to have been reserved. It is impossible to see how, from the testimony submitted to them, the jury reached that sum, for if the transaction was usurious the illegal interest taken greatly exceeded the amount found. But that is probably a fact not material here at this time. After the motion for a new trial was overruled Redick remitted $1013.32. A sum just large enough to reduce the judgment to $5,000.

The transaction alleged to be illegal was a sale of notes at a discount of twelve per cent. per annum. This was allowed by statute. "Any rate of interest which may be agreed upon not exceeding twelve dollars per year upon one hundred dollars shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon may be taken yearly, or for a shorter period, or

in advance, if so expressly agreed." Gen. Stat. of Nebraska, p. 446, chap. 34, Interest, sec. 1.

And this Court has always held that the deduction of interest from the amount loaned when the loan is made is not usurious if it do not exceed the rate allowed by law.

Flecknor vs. The Bank of U. S. 8 Whea. 457.
Thornton vs. The Bank of Washington. 3 Peters 36.

In flagrant violation of the statute and the law as held by this Court, the trial judge instructed the jury that it is not permissible for the Bank to deduct twelve per cent. per annum from the amount of securities which it purchases from the holder thereof. The reversal of the judgement was certain on account of this error if the case came here. To prevent this, Redick remitted the large sum of over $1,000, and to aid him the court accepted his offer.

The case is very different from one for unliquidated or uncertain damages. In such cases it may be quite proper for a judge to allow a judgment for a less sum than the jury gives a verdict for.

This Court will regard with great favor an exercise of discretion by a judge; but it certainly will not permit a gross abuse of discretion to go uncorrected;

especially when most important rights are violated. I do not think any of the recent judgments of this Court are conclusive of this case viewed in this aspect.

J. M. WOOLWORTH,

Attorney and of Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
APR 9 1893
JAMES H. McKENNEY, Clerk.

110-224

IN THE

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF OMAHA,
PLAINTIFF IN ERROR,
vs.
JOHN I. REDICK,
DEFENDANT IN ERROR.

Motion.

Comes now said defendant in error, John I. Redick, and moves the Court to dismiss the petition in error herein and quash the bill of exceptions, and for ground of this motion says:

FIRST. This Court has no jurisdiction of this case, because the amount involved does not "exceed, exclusive of costs, the sum or value of $5,000."

SECOND. The bill of exceptions was not presented and allowed within the time or in the manner provided by law.

THIRD. The action of the circuit court in refusing a new trial is not subject to review by proceedings in error.

JOHN I. REDICK,
In personam.

110-224

IN THE

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF OMAHA,
Plaintiff in Error,
vs.
JOHN I. REDICK,
Defendant in Error.

Error to the Circuit Court of the United States for the District of Nebraska.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS THE PETITION IN ERROR AND QUASH THE BILL OF EXCEPTIONS.

JOHN I. REDICK,
In personam.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1883.

IN THE

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF OMAHA,
PL'FF IN ERROR,
vs.
JOHN I. REDICK,
DEF'D'T IN ERROR.

Brief of Defdt. in Error on Motion to Dismiss.

This was a suit at law tried to a jury, at the November term, 1880, of the United States circuit court for the district of Nebraska.

This Court has no jurisdiction of this case, and the proceedings in error should be dismissed.

FIRST.—It appears, from the record, that the judgment in the court below was for $5,000—the amount involved does not, therefore, "exceed the sum or value, exclusive of costs, of $5,000," and this Court has decided, is not such a case as is within its jurisdiction.

See Western Union Telegraph Co. *vs.* Rogers, 3 Otto, 565.

See Thompson *vs.* Butler, 5 Otto, 694.

See Parker *vs.* Morrill, Supreme Court Reporter, p. 14, (decided at October, 1882, term.)

The verdict of the jury in the court below was in favor of the defendant in error for $6,100. Before judgment, how-

ever, defendant in error filed a remittitur for the balance, $5,000. After hearing argument, and consideration of said motion, the court allowed the remittitur, and entered judgment as prayed; to which no exception was taken.

The Court had the power to allow the remittitur, and enter judgment for the balance; and in so doing exercised a discretion, and this Court will not review its action, but look to the judgment alone to ascertain whether the amount involved is sufficient to confer jurisdiction.

See Lamar *vs.* Micou, p. 465, 14th Otto.

SECOND.—There is no record showing the matters complained of. That portion of the record purporting to be a bill of exceptions is not properly there, and should be disregarded.

Miller *vs.* Ehlers, 1 Otto, p. 249.

The Revised Statutes of the United States, section 914, requires the bill of exceptions in the Federal courts to be obtained in the same way as in the practice of the courts of the State in which the trial court is held. (Rev. Stat. U. S., sec. 914.)

We must, then, look to the statutes of Nebraska to see if the bill of exceptions was properly obtained.

The statute of Nebraska, as amended in 1877, laws of 1877, page 11, provides as follows:

"Section 308.—The party objecting to the decision must except, at the time the decision is made, and time may be given to reduce the same to writing as hereinafter provided."

"Sec. 311.—When the decision is not entered on the record, or the grounds of the objection do not sufficiently appear in the record, the party excepting must reduce his exception to writing within fifteen days, or in such time as the court may direct, not exceeding forty days, from the rising of the court; and submit the same to the adverse party,

or his attorney of record for examination, and amendment, if desired. Such draft must contain all the exceptions upon which the party relies. Within ten days after such submission, the adverse party may propose amendments thereto, and shall return said bill with his proposed amendments to the other party, or his attorney of record. The bill and proposed amendments must, within ten days thereafter, be presented, by the party seeking the settlement of the bill, to the judge who heard or tried the cause, upon five days' notice to the adverse party, or his attorney of record, at which time the judge shall settle the bill of exceptions. If no amendments are proposed, or if proposed and allowed, the proposed bill may be presented with the amendment, if any, to the judge for settlement without notice to the adverse party, or his attorney of record. When settled, the bill must be signed by the judge, with his certificate, to the effect that the same is allowed."

The cause was tried, and the verdict received at the November, A. D. 1880, term of Court. After the verdict, the defendant filed a motion for a new trial on account of errors alleged to have occurred at the trial in the admissions of evidence, and in charging, and refusing to charge as requested, the jury, and the motion was submitted at the November term under an order that briefs were to be filed within a certain time, which time, on motion of the defendant at the January, 1881, term, was enlarged.

The November term, 1880, was finally adjourned December 28th, 1880, and the January term commenced January 3d, 1881.

February 10, 1881, the motion for a new trial was overruled, and afterwards, February 17th, 1881, on motion of the defendant, it was allowed forty days to prepare a bill of exceptions. No bill of exceptions was reduced to writing, however, and served upon the plaintiff until February 26th,

1881, at which time there was served on the plaintiff a draft of a bill of exceptions, purporting to contain a history of the proceedings upon the trial of the cause at the November term, 1880, and setting forth certain errors alleged to have occurred at the trial.

As the defendant failed to serve the proposed bill of exceptions until sixty days after the close of the trial term, we respectfully submit the statute does not confer power upon the Court to sign the bill of exceptions at the time it was signed. The law is imperative, and the Court cannot enlarge the time within which the bill is to be served beyond forty days from the close of the trial term.

As the November term closed December 28th, 1880, and the fifteen days allowed by law expired January 12, 1881, we think it self-evident that a bill presented February 26th, 1881, should not have been signed. And the bill in this case would not have been signed had not Mr. Justice Miller, before the bill of exceptions was settled and signed, allowed the writ of error, and approved the supersedeas bond.

In Ohio, under a code precisely similar to that in Nebraska, a bill of exceptions, so allowed, would be disregarded.

See Kline *vs.* Wynne, 10 Ohio State, p. 223.
See Hicks *vs.* Person, 19 Ohio, p. 426.

But the Supreme Court of Nebraska has, it seems to us, settled the question. In Heavey *vs.* Fishburn, 3 Nebraska, at page 265, that Court said: "The case was tried and a verdict given at the April Term, whereupon a motion was filed for a new trial, which was continued and heard at the next October Term of the Court, at which time the exceptions appear to have been prepared and filed. This delay is not authorized by statute."

In 1st National Bank *vs.* Bartlett, 8 Nebraska, 221: "The party excepting has fifteen days from the rising of the court in which to reduce his exceptions to writing, and submit the same to the adverse party without an order of the court."

The decision in 3d Nebraska held simply that the statute then in force requiring the bill to be "reduced to writing during the term," meant the *trial* term, and that a continuance for hearing of a motion for a new trial did not in any way extend the power of the court beyond that term. The statute now in force, and in force at the time this cause was tried, provides that "the party excepting has fifteen days from the *rising of the court*, in which to reduce his exceptions to writing," &c., &c., which we contend means "from the rising of the court," at the *trial* term.

THIRD.—In the United States Circuit Court a motion for a new trial is addressed to the discretion of the court, and their action in granting or refusing a new trial is not subject to be reviewed.

See Newcomb *vs.* Wood, 7 Otto, 581.

In that case Mr. Justice Swayne says: "It has long been the established law in the courts of the United States, that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error. We cannot think that Congress intended by the act of June 1, 1872, to abrogate this salutary rule.

To recapitulate then—

1st. This Court has no jurisdiction of the case, by reason of the insufficiency of the amount in dispute.

2d. There is no record showing the errors complained of, because the bill of exceptions was not properly obtained or allowed; and